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No. 08-719

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IN THE

Supreme Court of the United States

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC.,

Petitioner,

—v.—

ASBESTOSIS CLAIMANTS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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POINT I

THERE ARE COMPELLING REASONS TO GRANT CERTIORARI

Contrary to Respondents' points a–c, page i, under their heading "Questions Presented" and elsewhere in their Brief, there are ample, indeed compelling, reasons to grant certiorari. As shown in the Petition, the Second Circuit's erroneous decision on application of setoff clearly conflicts with this Court's decisions, and that decision was chiefly grounded on Second Circuit's egregious actions departing from the accepted and usual course of judicial proceedings by first misstating what the relevant Plan subsection "authorized" and then effectively altering the subsection's words and meaning so as to lend apparent support to its misstatement. The aforesaid conflict is self-evident, and those actions (which departed far from the accepted and usual course of judicial proceedings) call for the exercise of this Court's supervisory power, perhaps especially in the bankruptcy setting, this Court having previously expressly referred to "its supervisory power over courts of bankruptcy", *Maggio v. Zeitz*, 333 U.S. 56, 59 (1948).

That state law is also involved is no bar to certiorari as this Court has often granted it in such cases.

The proper way of interpreting bankruptcy plans in judicial proceedings and the consistent application of setoffs in bankruptcy are serious matters not limited to this particular case and in those respects this case is not merely *sui generis*. Moreover, this Petition is specifically addressed to this Court in view of the Second Circuit's clear departure from

the accepted and usual course of judicial proceedings as set out in Point II of the Petition. This Court has well said, albeit in a case involving quite different circumstances, *New York Central Railroad Co. v. Johnson*, 279 U.S. 310, 318 (1929):

> . . . a trial in court is never, as respondents in their brief argue this one was, "purely a private controversy . . . of no importance to the public." The state, whose interest it is the duty of court and counsel to uphold, is concerned that every litigation be fairly and impartially conducted . . .

Petitioner respectfully submits that, at least, the Second Circuit's manner of "interpreting" the key Plan provision, as described in Point II of the Petition and below, was certainly not fair conduct of the litigation, and the circumstances unfortunately suggest it might not have been impartial.

Moreover, contrary to Respondents' point d, page i, the Second Circuit did not "enforce[ ] Plan provisions", but effectively, at Respondents' instance, improperly invented a new and different Plan provision which Second Circuit would wrongly enforce.

If this Court denies this Petition, the Second Circuit and other courts may be more disposed to ignore decisions of this Court or to rewrite bankruptcy plans (and other contracts) to improperly achieve a result they subjectively deem more equitable than enforcing the actual plan and other contractual provisions, as clearly occurred in this case.

Finally, Respondents (Brief 13-14, n.7) note two cases where certiorari was denied, *Brotherhood of Locomotive Firemen and Engineermen v. Bangor*

& Aroostook R. Co., 389 U.S. 327, 328 (1967) and *Virginia Military Institute v. U.S.*, 508 U.S. 946 (1993). However, they fail to point out that those cases were remanded simply to resolve ancillary issues and on that ground were not yet ripe for review. The situation here is altogether different: the Second Circuit's remand is solely for further proceedings in accordance with its opinion, i.e., determination of the values of a multitude of claims and payment thereof. Such a judicial enterprise would be very time-consuming for the courts and expensive for the parties concerned and futile if Second Circuit has erred, as Petitioner contends it clearly has. In that case, as Respondents recognize (Brief 21), Petitioner would not have been obligated to pay anything, and the vast judicial exercise of determining the amounts of thousands of claims, payments, and reimbursements would have been wasted. This also raises the specter of the practical impossibility of recovering actual payments from so many claimants, if at a later date certiorari is sought and granted and Petitioner's contentions are held to be correct.

Accordingly, the crucial importance in this matter of the issues raised by this Petition and the potential consequences if the Petition should be denied strongly support granting certiorari now and finally resolving these issues in light of the potential consequences referred to above.

POINT II

IN THIS MATTER CONCERNING THE BANKRUPTCY PLAN AND THE TERMS OF PETITIONER'S INDEMNITY INSURANCE POLICY, ESSENTIALLY INVOLVING CONTRACTUAL ISSUES, RESPONDENTS (AS DID THE SECOND CIRCUIT) FAIL TO CONSIDER THE TRUE WORDS AND MEANING OF THE KEY PLAN PROVISION CONCERNING THE CONSEQUENCES AMONG CLAIMANTS OF PETITIONER'S OFFSET AMOUNT, I.E., PRORATION AMONG CLAIMANTS OF A CLAIM AGAINST THE OFFSET AMOUNT. THE PROVISION HAS NOTHING TO DO WITH APPLICATION OF THE SETOFF BETWEEN PETITIONER AND THE TRUST, AND PETITIONER SHOULD HAVE BEEN HELD ENTITLED TO PAY NOTHING TO THE TRUST UNTIL PETITIONER HAD FULLY EXERCISED ITS SETOFF IN ACCORDANCE WITH LONG-ESTABLISHED LAW EXPLICITLY APPROVED BY THIS COURT

The Second Circuit's Opinion and Respondents' Brief in this matter have a number of things in common, but the most significant (and disturbing) is that neither quotes accurately or analyzes straightforwardly the actual material words in the pivotal subsection of the Plan concerning the consequences of the Club's setoff on claimants, § 4.05.07(a)(iv), which was the starting point for the Second Circuit's misconceived method of applying Petitioner's setoff right. Second Circuit's fundamental "mistake" was stating wrongly what the subsection "authorized",

without quoting its actual relevant words (an improper procedure). But perhaps its true intent is better revealed near the end of its opinion where Second Circuit purportedly "quoted" the subsection, but actually changed it, disguising its true meaning and making it appear to be consistent with what Second Circuit had wrongly stated the subsection "authorized". (22a–23a, n. 6) Second Circuit then dismissed Petitioner's argument with a flash of *faux* indignation as "frivolous". (23a)

In the Petition, we analyzed in detail the language and meaning of that subsection's material words and described how Second Circuit misstated what it "authorized" and thereafter, by omission and misleading bracketed addition, effectively changed the language so as to disguise the true words and wrongly indicate that its misstated "authorizing" was correct. (Petition, 20–27) We shall not repeat that analysis here. Significantly, Respondents make no effort to analyze and refute what we wrote and, as did the Second Circuit, Respondents never quote accurately or fully the material words in § 4.05.07(a)(iv).

The failure of Second Circuit and Respondents to accurately quote the full actual material language of the subsection and their use of erroneous quotation(s) make it extraordinarily difficult, indeed impossible, to determine precisely what language either "interpreted". This highlights the fundamental flaw caused by the Second Circuit's departure from the accepted and usual course of judicial proceedings.

POINT III

INSTEAD OF ENGAGING THE CONTRACTUAL ISSUES DIRECTLY AND FORTHRIGHTLY, RESPONDENTS' BRIEF RESORTS TO DISTORTIONS, INCOMPLETE QUOTATIONS, HALF-TRUTHS, IRRELEVANCIES, CONCLUSORY ASSERTIONS, AND APPEALS TO EMOTION WHICH CONFUSE AND OBSCURE RATHER THAN ENLIGHTEN

Respondents' Brief is devoted to irrelevancies, half truths, appeals to emotion and their own distortions, the more critical of which we discuss below.

1. Respondent's Deliberate Distortion of § 4.05.07(a)(iv)

The pivotal Plan provision which Second Circuit essentially rewrote in arriving at its improper method of applying setoff is § 4.05.07(a)(iv), which actually states in material part:

> . . . To the extent there shall be a determination that amounts are due and owing from PLI to a Club or insurer which the Club or insurer may offset or recoup against amounts due to PLI, Reorganized PLI, the PLI Disbursement Trust or any claimant in respect of Excess Claims (and to the extent such amounts are not otherwise offset pursuant to § 4.05.07(a)(i) of the Plan or otherwise), and *to the extent possible*, each holder of an affected Allowed Insured Claim *shall share ratably* (with all other holders of affected Allowed Insured Claims *based on the allowed amount of each such Insured Claim*) (a) *a claim against the offset or recouped*

> *amount* and shall receive in distribution therefor an Allowed Claim in Class 5C and (b) a claim in respect of any remaining insurance rights relating to such affected Allowed Insured Claims and shall receive in distribution therefor, *to the extent recovered*, cash from the insurer or Club equal to such holder's ratable share.

Plan, § 4.05.07(a)(iv), App. F, 77a–78a (emphasis added).

However, for example, Respondents (Brief 2) assert that the subsection provides that "each holder of an affected Allowed Insured Claim shall share [offsets] ratably (with all other holders of affected Allowed Insured Claims . . .)". When compared with the actual provision, it is clear that Respondents have improperly inserted "[offsets]" where nothing exists and omitted the words in parentheses following "claims" in the actual provision (which we have italicized *supra*), thereby conveying the false impression that what are to be shared ratably are multiple "offsets", when in fact what is to be shared ratably is "a claim against the offset or recouped amount", obviously meaning a *single* claim against the *single* total *previously* offset or recouped amount. Also, Respondents omit the concluding words in parentheses, "based on the allowed amount of each such Insured Claim", which make the true meaning doubly clear. Respondents' reprehensible change and omission, although not identical, are somewhat similar to Second Circuit's misquotation. (22a–23a, n. 6)

Similarly, Respondents, in quoting § 4.05.07(a)(iv):

(a) at Brief 9, after "ratably", omit the parenthetical phrase "(with all other holders of affected Allowed Insured Claims based on the allowed amount of each such Insured Claim)", which makes

it very clear that the ratable amount can only be calculated after the allowable values of all claims have been determined (Petition 24), which excludes piecemeal "estimates" of the offset, as Second Circuit's decision would wrongly require;

(b) at Brief 17, make the same omission as in (a) above, with the same effect;

(c) at Brief 19, after "ratably", wrongly insert "[the Petitioner's offsets]" rather than the actual language, ". . . a claim against the offset . . . amount . . . ," thereby falsely suggesting that the offsets (plural) are to be shared, possibly while being exercised, or even before, but in any case piecemeal–rather than sharing only a single claim against the single offset amount, as the subsection plainly requires.

2. Respondents Deliberately Misstate Petitioner's Position Regarding § 4.05.07(a)(iv)

Respondents (Brief 17-19) quote a portion of the Supplemental Disclosure Statement ("Statement") (119a) and wrongly assert (Brief 18-19), that "Petitioner well understood the import and meaning," apparently referring to Respondents' (and Second Circuit's) new, improper interpretation of § 4.05.07(a)(iv). Respondents are incorrect. They also ignore material provisions of the Statement immediately preceding their partial quotation which further demonstrate the falsity of Respondents' obscure argument, as well as we can understand it.

The Statement at 116a states:

> No assurances can be given that the PLI Disbursement Trustee will be able to preserve insurance rights and to obtain cash payments in

respect of Excess claims from Clubs or other insurers. The provisions in the Modified Plan concerning Insured Claims have not been agreed upon by any Clubs.

At 118a, the Statement also states:

The extent of the American Club's Claim may be disputed and it may, in turn, owe PLI certain amounts in refunds of premiums and for reimbursement of certain losses incurred by PLI before the Effective Date . . . Under the Modified Plan, in order to try to preserve insurance coverage, the PLI Disbursement Trust will be authorized (to the extent permitted under applicable law) to setoff such amounts owed to PLI against the American Club's Claim. *Nevertheless, it is possible that, after adjustment of the various amounts owing, the American Club may have a substantial net Claim against PLI, and the American Club has taken the position that until any net amount owed to it by PLI is satisfied it will not make cash payments in respect of any Claims*[1], [2]. (Emphasis added)

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[1] The qualifiers to the Plan in § 4.05.07(a)(iv) "to the extent possible" and "to the extent recovered" along with the qualifiers in other Plan sections clearly (a) reflect an uncertainty of result and (b) preserve the American Club's defenses, as expressly held by the bankruptcy court. (App. C, 49a) This uncertainty is outlined in the Supplemental Disclosure Statement, Appendix G, particularly at 112a–122a., as well as throughout the Plan, Appendix F.

[2] Further, as Respondents concede (Brief 10) the amount of Petitioners' setoff was not finally determined until 1992, two years after the Plan was confirmed. (App. H, 176a)

There can be no doubt of Petitioner's position—the Plan *does not* authorize or require proration of its setoff on a piecemeal basis while being applied as Respondents wrongly argue and Second Circuit has wrongly held, and Petitioner, as shown above, made clear that it would not agree to do so, and of course still maintains that position.

In any case, the language in the Statement is substantially the same as in the Plan itself. The Statement says, ". . . each holder of an affected Allowed Insured Claim will share ratably a Class 5C Claim equal to the offset or recouped amount . . .". In a shorthand way, the Statement telescopes down the Plan's language and substitutes the Plan's somewhat arcane usage of "against" by "equal to", with the same result. Significantly, the "ratable sharing" in both the Plan and the Statement is in respect of "the offset . . . amount", confirming (a) that the proration applies to the single (total) amount already offset and (b) that § 4.05.07(a)(iv) has nothing to do with the manner of applying Petitioner's setoff right against the Trust.

As Respondents' (and Second Circuit) have clearly erroneously "interpreted" § 4.05.07(a)(iv), there is no basis for their unwarranted assertions that Petitioner should have appealed the Order confirming the Plan.

3. Respondents' (and Second Circuit's) Accusations that Petitioner Has "Dragged Out" the Matter Are Meritless

At Brief 5, fn 3, Respondent asserts that Petitioner has "dragged out" the matter, allegedly for improper purposes. This is a false argument. The Plan was approved in 1990 and Respondents delayed for four-

teen years, until 2004, to assert their new and erroneous "interpretation" of § 4.05.07(a)(iv) and submit their motion thereon to the bankruptcy court. Clearly, Respondents "dragged out" the matter, *not* Petitioner.

4. Respondents Make Peripheral Arguments Calculated to Raise Equitable Questions or Appeals to Emotion

(a) Respondents (Brief, 2, 3, 4, 10, 13,14, 16, 22) repeatedly and emotionally refer to the fact that PLI fully paid premiums and assessments for 37 of the 41 years to Petitioner, as though that fact makes any difference in regard to the proper legal exercise of Petitioner's setoff rights. It does not, and no spin by Respondents can change the fact that PLI owes the Petitioner over $1.2 million, which it is entitled to setoff in full before making any payment to the Trust.

For reasons detailed in the Petition (8, 13-19), the bankruptcy court's decision and judgment in 1992 expressly granted the Petitioner an unfettered right to setoff against sums payable to the Trustee under triggered policies. That decision and judgment were correct, were not appealed by the Trust or Respondents, are the law of the case, and are *res judicata* as against the Trust and Respondents. Second Circuit sought to avoid their effect by the shallowest of reasoning and a clear departure from the accepted and usual course of judicial proceedings, including the unjustifiable changes it made in "quoting" § 4.05.07(a)(iv), all as set forth in Point II of the Petition (19–27) and above.

(b) Respondents' counsel go outside the record to argue that PLI "paid millions" in premiums for

annual insurance contacts and that large numbers of seamen assertedly have been diagnosed with asbestos-caused diseases. (Brief, 5) Even if such assertions are true, there is no reason to give them weight in the present contractual dispute on the legal rights and obligations of the parties to the insurance contract and to all of the parties contractually bound by the Plan. Accordingly, such considerations are irrelevant. *See*, *Manufacturers Finance Co. v. McKey*, 294 U.S. 442 (1935) in which this Court said at 448:

> The mere fact that a party is obliged to go into a federal court of equity to enforce an essentially legal right arising upon a contract valid and unassailable under controlling state law does not authorize that court to modify or ignore the terms of the legal obligation upon the claim, or because the court thinks, that these terms are harsh or oppressive or unreasonable. A party may stand upon the terms of a valid contract in a court of equity as he may in a court of law.

Here, Respondents would (and Second Circuit has) clearly breach(ed) that sound principle by modifying or ignoring the actual terms of the Plan.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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